DATE: September 9, 1993
CASE NO. 87-ERA-25

IN THE MATTER OF

J. MARSHALL TRIEBER,

COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY AND
SYSTEM ENERGY RESOURCES, INC.,

RESPONDENTS.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER

Before me for review is the Administrative Law Judge's (ALJ) [Recommended] Decision and Order Granting Motions for Summary Judgment in this case which arises under Section 210 of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). The ALJ recommends that the complaint be dismissed because there is no material issue of fact and Respondents are entitled to judgment as a matter of law.

The parties filed briefs before me. After reviewing the entire record, I find that I agree with the ALJ's recommendation and, pursuant to 18 C.F.R. § 18.41(a), grant summary judgment to Respondents.

I. *Alleged Facts*

Complainant Trieber was employed by Mississippi Power & Light Company, the predecessor in interest to Respondent System Energy Resources, Inc. ("SERI") from January 1984 until he was discharged in January 1986. Complainant's Motion for Reconsideration (Comp. Motion for Recons.), Ex. 16, par. 8. Complainant filed an earlier complaint with the Department of Labor contending that SERI violated the ERA when it dismissed him

after he made internal safety complaints concerning the training of operators. The earlier complaint was denied on the ground that it was not timely filed. [1]

Trieber contends that SERI blacklisted him from subsequent employment in the nuclear industry. In the summer of 1986, Long Island Lighting Company (LILCO) paid his travel and expenses for an interview for a position in the training department at its Shoreham, New York nuclear plant. Comp. Motion for Recons., ex. 16, par. 10. When Trieber arrived for the interview, the head of the training department did not interview him. *Id.* Instead, an instructor gave Trieber only a token interview, after which Trieber was not hired. *Id.*

Later that year, Stone and Webster, Inc., which worked closely with nuclear plant operators, wrote to Trieber, stating an interest in his qualifications and directing him to call collect to arrange an interview. Comp. Motion for Recons., Ex. 16, par. 11. The designated person for Trieber to contact would not accept the collect charges, however, and Trieber did not have an interview and was not hired. *Id.* Trieber contends that Stone and Webster and LILCO lost interest in hiring him because SERI informed them that he was a troublemaker.

In early 1987, a "job shop" contractor, CDI Corporation, forwarded Trieber's resume for consideration for a position with Respondent Tennessee Valley Authority (TVA). TVA S.J. Motion, Thompson aff., par. 2. Richard Thompson of TVA interviewed Trieber by telephone and hired him to write training manuals at TVA's Sequoyah nuclear plant. *Id.* According to Trieber, Thompson said that the contract position would start as soon as possible, was for six months' duration, and that he anticipated a permanent opening with TVA after that time. Comp. Motion for Recons., Ex. 16, par. 12. Trieber successfully negotiated a higher hourly rate of pay than TVA had planned for the position. *Id.* at par. 13.

Trieber reported to TVA's Knoxville headquarters for three days of orientation, during which he learned about the TVA's training manual format and began work on a manual. *Id.* at par. 15. Upon meeting Trieber in person, Thompson formed the opinion that Trieber was not the right person for the Sequoyah position but nevertheless allowed Trieber to report to Sequoyah on his fourth work day. TVA S.J. Motion, Thompson aff., par. 4.

At Sequoyah, Trieber reported to Jim Hartman, who supervised the contract employees. *Id.* at par. 5. Trieber continued to work on a preliminary draft of a training manual. Comp. Motion for Recons., Ex. 16, par. 19. Trieber was expected to work independently and no one from TVA reviewed Trieber's work. *Id.*

According to Trieber, during the morning of his sixth day at TVA, Hartman commented that Trieber was making great progress.

Id. at par. 20. Thompson, who was visiting the Sequoyah plant the same morning, allegedly told Trieber that he understood that things were going well. *Id.* at par. 21. Shortly thereafter, however, CDI telephoned Trieber to inform him that TVA had fired him. *Id.* at par. 22. When Trieber asked Thompson why he had been fired, Thompson purportedly stated only that he had gotten "input" on Trieber. *Id.* at par. 24, 25. Trieber finished the rough draft of the training manual, gave it to Hartman, and left TVA later that day. *Id.* at par. 27.

Trieber noted that on the same day he was fired from TVA, a Department of Labor employee notified SERI by telephone that Trieber had filed the earlier ERA complaint against SERI. Comp. Response to S.J. Motions at 27. Trieber contends that someone at TVA must have spoken with someone at SERI, learned that Trieber was a "whistleblower," and decided to fire him as a result. Comp. Supp. Memo. in Opp. to S.J. Motions at 19-20.

II. *Motions for Summary Judgment*

Following his discharge from TVA, Trieber filed this complaint alleging that SERI blacklisted him and that TVA discharged him when it learned he had been a whistleblower at SERI. In support of their motions for summary judgment, SERI and TVA argued that there was no evidence demonstrating communications between SERI and any of the organizations that allegedly blacklisted him: TVA, Stone and Webster, and LILCO. SERI submitted affidavits of four of the five employees Trieber had identified as participating in blacklisting him. It also provided the affidavit of the supervisor of the fifth employee, who had since left SERI's employ. All of the SERI employees stated that they had no communication or contact with anyone at LILCO, Stone and Webster, or TVA. SERI S.J. Motion, Ex. F through K.

In support of its motion, TVA relied upon affidavits of Hartman, Thompson, and Thompson's supervisor, Dan DeFord. All of the TVA employees stated that they had no knowledge about Trieber's employment at SERI and did not have any communications about Trieber with anyone at SERI, Stone and Webster, or LILCO. Hartman and Thompson stated that they decided to fire Trieber because they believed he could not perform the required work independently and therefore was not suited to the position. DeFord stated that he concurred in the decision to discharge Trieber.

After receiving several extensions to permit discovery, deposing several SERI employees, and obtaining numerous documents, Trieber opposed the motions for summary judgment. See R.D. and O. at 19-20. Trieber contended that the motive, intent, and credibility of witnesses was at issue and could not be judged

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from affidavits alone. Comp. Response to S.J. Motions at 29. Trieber argued that the fact that TVA discharged him "a very short time after the DOL informed [SERI]" about Trieber's earlier complaint permitted the inference that he was discharged because TVA learned about his whistleblowing activities while employed by SERI. Comp. Supp. Memo. at 19.

III. *The ALJ's Decision*

The ALJ found that Complainant's internal safety complaints to SERI constituted protected activity under the ERA. R.D. and O. at 17. The ALJ explained that the party opposing a summary judgment motion must submit either direct, circumstantial, or inferential evidence to show that a genuine issue of fact exists. *Id.* Viewing the facts in the light most favorable to Trieber, the ALJ found that "there is no evidence, as opposed to remarkable coincidence" linking alleged blacklisting by SERI to TVA's actions. *Id.* at 19. The ALJ found that TVA already

had decided to fire Trieber prior to the time SERI received the phone call notifying it about Trieber's earlier whistleblower complaint. *Id.* The ALJ reasoned that TVA's discharge could not be connected to the Department of Labor's phone call to SERI. *Id.* Finding Complainant's evidence insufficient as a matter of law, the ALJ granted the summary judgment motions and recommended dismissing the complaint.

IV. *Preliminary Matters*

Trieber, SERI, and TVA filed both initial and reply briefs before me. On the ground that the reply briefs filed by TVA and SERI were unauthorized, Trieber moved to strike Respondents' "supplemental replies," or in the alternative, for leave to file a supplemental reply. TVA contended that the reply briefs were authorized in the Order Establishing Briefing Schedule. TVA is correct and Trieber's motion to strike, or for leave to file a supplemental reply, is denied. [2]

Respondents submitted various letters to the Secretary enclosing copies of recent decisions in other cases and Trieber responded to the submissions. In a letter dated February 12, 1992, SERI moved to strike a specific "allegation" in Trieber's January 31, 1992, responsive submission. Neither the regulations nor the briefing order in this case contemplated submission of decisions or argument after the reply briefs. Nevertheless, since all parties engaged in providing such submissions or responses, I will accept into the record in their entirety all of the submissions made after reply briefs were filed. SERI's motion to strike a specific allegation in Trieber's January 31, 1992, letter is denied.

Finally, I have considered Trieber's November 1989 Motion for Reconsideration of the ALJ's decision. In light of my affirmance of the ALJ's decision, the motion for reconsideration

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is denied.

V. *Analysis*

A motion for summary judgment in an ERA case is governed by 18 C.F.R. §§ 18.40 and 18.41. *See, e.g.*, *Howard v. Tennessee Valley Authority*, Case No. 90-ERA-24, Final Dec. and Order of Dismissal, July 3, 1991, slip op. at 4. A party opposing a motion for summary judgment "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c).

Under the analogous Fed. R. Civ. P. 56(e), the non-moving party "may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. . . . Instead, the [party opposing summary judgment] must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby*, 477 U.S. 242, 256-257 (1986). *See also*, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Carteret Sav. Bank, P.A. v. Compton, Luther & Sons, Inc.*, 899 F.2d 340, 344 (4th Cir. 1990). The non-moving party's evidence, if accepted as true, must support a rational inference that the substantive evidentiary burden of proof could be met. *Bryant v. Ebasco Services, Inc.*, Case No. 88-ERA-31, Dec. and Order of Rem., July 9, 1990, slip op. at 4., citing *Liberty Lobby*, 477 U.S. at 247-252. If

the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," there is no genuine issue of material fact and the movant is entitled to summary judgment. *Celotex*, 477 U.S. at 322-323.

SERI properly supported its motion with affidavits which showed that the relevant SERI personnel had no communication with either TVA, Stone and Webster, or LILCO personnel, and consequently that SERI could not have blacklisted Trieber from employment with those companies. Similarly, the affidavits of the TVA personnel showed that none of them had any knowledge of Trieber's activities while employed by SERI, and did not discharge him because of any such activities.

The ALJ was exemplary in providing sufficient time and opportunity for Trieber to engage in discovery of evidence with which to oppose the summary judgment motions. The key issues are whether there is any evidence that SERI communicated with either TVA, Stone and Webster, or LILCO concerning Trieber's whistleblower activities while employed by SERI, and whether TVA had any knowledge of those activities when it discharged Trieber.

Concerning TVA, Trieber introduced inferential evidence that TVA had learned of Trieber's whistleblower activities at SERI because TVA fired him the same day that the Department of Labor

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informed SERI of Trieber's earlier ERA complaint. However, Trieber obtained through discovery and submitted a telecopy of a message which establishes that Thompson had already notified the contract specialist who administered the job shop contract with CDI that TVA was discharging Trieber prior to the time that the Department of Labor telephoned SERI. Comp. Br. Ex. 24 at 2-3. Therefore, it was not possible that the Department's notice to SERI prompted some communication between SERI and TVA that ultimately led to TVA discharging Trieber.

Trieber argues that Thompson's only explanation for the firing was that Thompson had received "input" about him. Trieber provides several allegedly "probable" meanings for the term "input": that TVA had heard about Dr. Trieber's complaint to the DOL against [SERI]," that "TVA was contacted by personnel from SERI/MP&L about Dr. Trieber and his alleged 'troublemaking'," and that "one of the high level personnel that was exchanged told TVA of the 'Trouble Maker'." Comp. Reply Brief at 6-7. I find these inferences from Thompson's purported use of the word "input" to be pure conjecture, since there is no record evidence indicating that anyone at SERI had any communication with anyone at TVA concerning Trieber.

Thompson stated in his affidavit that he told Trieber "it was not just [Thompson's] decision" to fire Trieber. TVA S.J. Motion, Thompson aff. par. 8. TVA submitted affidavits indicating that two other managers were involved in the discharge decision. Prior to the firing, Thompson obtained Hartman's opinion that Trieber was not suited for the job, TVA S.J. Motion, Hartman aff., par. 5 and Thompson aff., par. 6, and before the discharge, DeFord indicated his concurrence in the decision. TVA S.J. Motion, Thompson aff., par. 7 and DeFord aff., par. 5. The opinions of Hartman and DeFord are equally probable meanings for

the term "input," assuming that Thompson used it.

Concerning SERI's alleged blacklisting of Trieber with Stone and Webster and LILCO, the only "evidence" on which Trieber relies is his conjecture that some communication with SERI must have caused the two organizations' disinterest after they initially expressed interest in his qualifications. Despite extensive opportunity for discovery, Trieber provided no affidavits or other evidence indicating communication between SERI and either Stone and Webster or LILCO, however.

I agree with the ALJ that Trieber submitted neither direct, circumstantial, nor inferential evidence of blacklisting by SERI or unlawful discharge by TVA. R.D. and O. at 17-19. Under the standards governing summary judgment, *Liberty Lobby*, 477 U.S. at 256-257, Trieber has not met his burden of presenting affirmative evidence to defeat the properly supported motions for summary

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judgment. I find that there is no genuine issue of material fact and that Respondents are entitled to judgment as a matter of law. Accordingly, I concur in the ALJ's grant of summary judgment in favor of Respondents and the complaint is DISMISSED.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Trieber acknowledges that his earlier complaint concerning discharge from SERI was not timely filed. February 11, 1987 Complaint at 1; Ex. A. to SERI Motion for Summary Judgment (SERI S.J. Motion).

[2] I have considered the substantive arguments Trieber made in his motion to strike.